BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAULA L. CURTIS	)	
Claimant	)	
VS.	)	
	)	
ST. RAPHAEL NURSING SERVICES, INC.	)	
Respondent	)	Docket No. 1,064,498
AND	)	
	)	
ULLICO CASUALTY COMPANY/KANSAS INSURANCE GUARANTY ASSOCIATION[1]	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and Kansas Insurance Guaranty Association (KIGA) appealed the September 26, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on December 3, 2013. Jonathan E. Voegeli of Wichita, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and Kansas Insurance Guaranty Association. The Kansas Workers Compensation Fund was previously a party to this claim, but on September 26, 2013, claimant, respondent, KIGA and the Fund entered into an Agreed Order that dismissed the Fund from this claim. At oral argument, the parties agreed they were not contesting the ALJ's decision to proceed with the preliminary hearing despite the Court of Chancery of the State of Delaware issuing an order staying all proceedings for 180 days against Ullico Casualty Company and the entities it insures.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 26, 2013, preliminary hearing and exhibits thereto; the transcript of the May 23, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

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[1] The September 26, 2013, Order shows Ullico Casualty Company as the insurance carrier in its heading. Due to a receivership involving Ullico, it appears this claim has been assigned to Kansas Insurance Guaranty Association.

ISSUES

Claimant asserts she sustained a right knee injury by accident on November 9, 2012, arising out of and in the course of her employment with respondent. At the September 26, 2013, preliminary hearing, claimant sought medical treatment and payment of medical expenses previously incurred.

Respondent and KIGA assert claimant's right knee injury did not arise out of and in the course of her employment because it arose out of a neutral risk or was the result of a normal activity of day-to-day living.

The ALJ determined claimant sustained an injury by accident arising out of and in the course of her employment with respondent, ordered treatment with Dr. John Osland and ordered all medical expenses paid.

The sole issue is: did claimant prove she sustained a right knee injury by accident on November 9, 2012, arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On November 9, 2012, the date claimant injured her right knee, she was a CNA/HHA for respondent. She had been working for respondent since 2007 and took care of clients' needs, including feeding and clothing them and cleaning their homes. On November 9, 2012, claimant had two clients for whom she provided care. Claimant was injured while at the home of the first client she saw that day.

After feeding the client lunch, claimant would round up all the trash and take it out the back door. Claimant would take out the trash by exiting the house through a door leading into the garage. Claimant described the accident as follows:

> I would feed him lunch and then get all the trashes rounded up and take the trash out to the backdoor *[sic]*. When I go out to the back, I would leave from the garage door leading into the garage, but there's a platform, wooden platform with steps and a railing out here, and I'd walk down the steps and out to the backdoor *[sic]* leading to the right. Drop the trash out there, come back in to the steps. I stepped up the step and as I stepped up the step to reach the garage door button to open the garage door so I could leave, I stepped up that step and it just popped. My knee and foot didn't get the step and my knee just popped. And I grabbed my knee in pain and hobbled myself out of there.[2]

[2] P.H. Trans. (Sept. 26, 2013) at 9-10.

Claimant indicated that she slipped on that step because she was stretched out reaching for the garage door button. There was a railing on the right side of the steps and the button was on the left side. The button is located three steps up. In order to reach the button, claimant stepped with her right leg and reached with her right hand to push the garage door button. When claimant stepped up to reach the garage door button, she was unable to use the railing. As she was reaching up to push the garage door button, her foot slipped and she felt the pop in her knee.

Claimant testified she is required to close the garage door, as it is the policy of the neighborhood that the garage door has to be closed. She indicated the garage door is key-coded, so one has to key-code and lock it to shut the door.

After claimant left the client's home, she thought she called her employer to report the injury and that she was on the way to her next client. Claimant continued her job duties for that day. She drove to get lunch for her next client and took it to the client. The client noticed claimant was in severe pain and told claimant to sit down and rest while the client ate. Claimant called the office at that time and let them know and they sent her to see a doctor. Claimant felt pain throughout her shift.

Claimant testified of having a lot of pain in both knees. Both knees started aching from the work she was doing. Claimant has walked with a limp since the injury.

Claimant acknowledged on cross-examination that she had a garage door opener at her house and she had to go up a step to get into her house. The following exchange took place between respondent and KIGA's attorney and claimant:

> Q. (Mr. Vernon) The activity that you describe giving rise to the injury to the knee sounds very similar to my house. I have to go into the garage, go up the flight of stairs, go up four or five steps and then reach up and hit the garage door button.
>
> A. (Claimant) Mm-hmm. (Witness motioned head affirmatively.)
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> Q. You very well could've been at my house, but you were at some client's house at that time, correct?
>
> A. Yes.[3]

As a result of this injury, claimant received medical care on November 9, 2012, from Dr. Mark S. Dobyns at Via Christi Clinic, P.A. The doctor initially diagnosed claimant with a sprained right knee, prescribed medication and ordered an MRI. Following a November 13, 2012, MRI, Dr. Dobyns diagnosed claimant with a right medial meniscus tear and right knee sprain. Claimant was referred to Dr. John D. Osland, an orthopedic surgeon, who

[3] *Id.* at 15.

saw claimant on November 27, 2012. His impressions were a right medial meniscus tear, some chondromalacia patellae and a synovial fat pad that looked pinched and inflamed. In response to a letter dated March 28, 2013, from claimant's counsel, Dr. Osland indicated claimant's work accident was the prevailing factor causing her injury for which treatment was sought.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> . . .
>
> (2)(B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2012 Supp. 44-508(g) and (h) state:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Respondent and KIGA contend claimant's actions on the date of accident were no more than normal activities of daily living, as claimant simply reached for the garage door button and her right knee gave out. The Kansas Supreme Court addressed this issue in *Bryant*.[4] Bryant suffered a low back injury in 1997, leading to surgery in 1998. Bryant began working for the respondent in 2001, missing several days due to persistent back pain. On March 2, 2003, Bryant stooped over to grab a tool out of his tool bag, and when he twisted back to work, he felt a pop or snap in his back and experienced a sudden, severe increase of pain in his lower back. He returned to work and on May 13, 2003, while working on an air conditioner installation, he stooped down or tried to lean over to weld and felt an explosive increase in pain. He eventually underwent a multi-level fusion in his back. Both the ALJ and the Board awarded Bryant benefits. But, both were reversed by the Kansas Court of Appeals, which found Bryant was precluded from compensation because his injuries were the result of "'normal activities of daily living.'"[5]

The Kansas Supreme Court reversed the Kansas Court of Appeals, finding Bryant was not engaged in the normal activities of day-to-day living when he reached for his tool belt or bent down to carry out a welding task. The Kansas Supreme Court analyzed activities of daily living as follows:

> Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal

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[4] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[5] *Id.* at 587.

> quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers' Compensation Law § 1.03[1] (2011).
>
> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the *[sic]* whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[—]bending, twisting, lifting, walking, or other body motions[—]but looks to the overall context of what the worker was doing[—]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[6]

Here, claimant was engaged in a work activity of taking out the garbage for her client and exiting that client's home to proceed to the home of another client when she slipped and injured her right knee. That is similar to Bryant's act of reaching for his tool belt, twisting and injuring his back. Also, neighborhood rules where the client lived required that the garage door be shut. Respondent and KIGA seek to isolate the specific activity of walking up the steps to push the garage door button and characterize it as a normal activity of daily living. The Kansas Supreme Court, in *Bryant*, rejected that legal theory.

This Board Member also finds claimant's accident and resulting injury did not arise from a neutral risk, but rather arose from an employment risk. Claimant took out the trash for respondent's client and after doing so was leaving to travel to the home of another of respondent's clients. It cannot be said that claimant's actions were of a neutral risk and had "no particular employment character."

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, the undersigned Board Member affirms the September 26, 2013, preliminary hearing Order entered by ALJ Clark.

IT IS SO ORDERED.

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[6] *Id.* at 595-596.

[7] K.S.A. 2012 Supp. 44-534a.

[8] K.S.A. 2012 Supp. 44-555c(k).

Dated this ____ day of December, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable John D. Clark, Administrative Law Judge